

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
34 PARK ROW LUNCHEONETTE, INC.	:	DETERMINATION
	:	DTA NO. 818786
for Revision of a Determination or for Refund of Cigarette	:	
Tax under Article 20 of the Tax Law for the Period Ending	:	
November 11, 2000.	:	

Petitioner, 34 Park Row Luncheonette, Inc., c/o Harry Kar,¹ 155 Buel Avenue, Staten Island, New York 10305, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ending November 11, 2000.

A small claims hearing was held before Winifred M. Maloney, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington, Avenue, New York, New York on October 23, 2002 at 11:00 A.M. Petitioner appeared by Chris Kotsonis. The Division of Taxation appeared by Barbara G. Billet, Esq. (Mary Fontaine).

Since neither party elected to reserve time to file a brief, the three-month period for issuance of this determination began as of the date the hearing was held.

ISSUE

Whether petitioner filed a timely request for a conciliation conference.

¹ Harry Kar is also known as Haralambos Karamarios. Mr. Kar is president of 34 Park Row Luncheonette, Inc.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued a Notice of Determination dated April 30, 2001 to petitioner, 34 Park Row Luncheonette, Inc., for the period ending November 11, 2000. The notice assessed a penalty of \$1,000.00 and gave the following explanation “During an inspection of your premises, on 11/11/00, you were found to be in violation for failure to possess a valid New York State certificate of registration for retail sales of cigarette and/or tobacco products.”

2. Petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”). The request form signed by Chris Kotsonis is dated August 25, 2001. The envelope within which the request form was mailed, by certified mail, bears a United States Postal Service (“USPS”) postmark of September 5, 2001, and also bears a stamp indicating receipt by BCMS on September 10, 2001.

On the request form, the following entry appeared in the section to record any change of address: “155 Buel Avenue, Staten Island, NY 10305.” The following entry appears in the section to record the name, telephone number and address of the taxpayer’s representative: “CHRIS KOTSONIS, (718) 9792464, 91 ZOE STREET, STATEN ISLAND, NY 10305.” The basis of the disagreement is not set forth on the request form. A letter dated August 25, 2001 written by Ms. Kotsonis was attached to the request form along with copies of the Tax Enforcement Referral Report and the Regulatory Report issued on November 11, 2002 by the Division’s Office of Tax Enforcement. In that letter, Ms. Kotsonis requested a conciliation conference on behalf of petitioner. The letter does not set forth any basis for the disagreement with the Notice of Determination.

3. On September 28, 2001, BCMS issued a Conciliation Order Dismissing Request to petitioner. Said Order was issued based on the following explanation:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on April 30, 2001, but the request was not mailed until September 5, 2001, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

4. On October 3, 2001, petitioner filed a petition for a hearing with the Division of Tax Appeals. Since petitioner's request was dismissed on the basis that it was filed late, the hearing held herein was accordingly limited to the issue of the timeliness of said request.

5. During the hearing, the Division submitted sworn affidavits from Geraldine Mahon, Principal Clerk of the CARTS² Control Unit and James Baisley, Chief Mail Processing Clerk. These affidavits served to describe the Division's standard mailing procedures, which, according to the affidavits, were used in mailing the Notice of Determination at issue to petitioner.

6. Ms. Mahon appended to her affidavit as Exhibit "A" a certified mail record which lists the Notice of Determination issued to petitioner. She attests that Exhibit "A" is "a true and accurate copy of the certified mail record prepared by the Department for the statutory notices mailed via certified mail on April 30, 2001, including the Notice of Determination issued to petitioner 34 Park Row Luncheonette, Inc."

7. Exhibit "A" consists of a 33-page computer-generated document entitled "ASSESSMENTS RECEIVABLE, CERTIFIED RECORD FOR NON-PRESORT MAIL." Page one of this CMR lists an initial (printing) date of April 18, 2001, which has been manually

² The acronym "CARTS" stands for Case and Resource Tracking System and refers to the Division's computer system for generating among other things, notices of determination to taxpayers under Article 20 of the Tax Law.

changed to April 30, 2001. The 20-digit certified control numbers on the CMR do not run sequentially. Each page contains 11 entries with the exception of the last page (page 33) which contains 7 entries for a total of 359 entries. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the 33 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts.³

8. The information concerning the Notice of Determination issued to petitioner is contained on page 8 of the CMR. Review of page 8 of the CMR indicates that a Notice of Determination, with notice number L 019301444, was sent to “34 PARK ROW LUNCHEONETTE INC., 34 PARK ROW, NEW YORK, NY 10038-2302,” by certified mail using certified control number 7104 1002 9739 0014 1045. Each page of the CMR bears the postmark of the Colonie Center Branch of the USPS, dated April 30, 2001. The last page of the CMR, page 33, contains a pre-printed entry of 359 corresponding to the heading “TOTAL PIECES AND AMOUNTS LISTED.” This pre-printed entry has been manually circled and beneath it is the illegible signature or initials of a Postal Service representative.

9. Attached to Ms. Mahon’s affidavit as Exhibit “B” is the Notice of Determination issued to petitioner. She attests that Exhibit “B” is “a true and accurate copy of the Notice of Determination mailed to the petitioner, 34 Park Row Luncheonette, Inc, on April 30, 2001.”

10. Exhibit “B” consists of two documents. The first document is a copy of a Form DTF-997 (6/99) that contains the Department’s “Audit Div-C.O.- FACCTS - Commodities” unit’s Albany, New York address, certified mail control number 7104 1002 9739 0014 1045 and the

³ Portions of Exhibit “A” have been redacted to protect the privacy of taxpayers who are not a party to this proceeding.

corresponding certified bar code and petitioner's name and address, "34 Park Row Luncheonette Inc., 34 Park Row, New York, NY 10038-2302" on the upper third of the document. The record is silent as to the document's creator, its manner of creation and its purpose. The second document is a copy of a Notice of Determination addressed to petitioner, 34 Park Row Luncheonette Inc., 34 Park Row, New York, NY 10038-2302, bearing assessment identification number L-019301444. The certified control number does not appear on the Notice of Determination.

11. Petitioner was located near New York City Hall at 34 Park Row. On November 18, 2000, petitioner closed its doors because the landlord bought out the remaining five-year term of its lease. A large electronics store now occupies the site.

12. The record includes petitioner's Sales and Use Tax Return for the period September 1, 2000 through November 30, 2000. Harry Karamarios, petitioner's president signed this return on December 15, 2000. The return, marked "Final," lists petitioner's address as 34 Park Row, New York, New York 10038-2302.

13. After petitioner closed its doors, Mr. Karamarios requested that the USPS forward petitioner's mail to 161 Hull Avenue, Staten Island, New York 10306, the address of Mr. Karamarios's daughter, Susan Platis, an attorney.

14. Petitioner's representative acknowledged that petitioner received the Notice of Determination on an unspecified date.

SUMMARY OF THE PARTIES' POSITIONS

15. The Division's representative maintained that petitioner's Request for Conciliation Conference was filed late. Accordingly, petitioner is not properly entitled to either a conciliation conference or a hearing on the substantive issues raised in the Notice of Determination.

16. Petitioner's representative asserts that petitioner's Request for Conciliation Conference was filed as soon as she received the copies of the reports issued by the Division's Office of Tax Enforcement concerning the alleged inspection of petitioner's premises.

CONCLUSIONS OF LAW

A. A petition contesting a Notice of Determination must be filed within 90 days after the giving of notice of such determination (Tax Law § 478).

B. As an alternative to filing a petition in the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS; the time period for filing such a request is also 90 days (*see*, Tax Law § 170[3-a][a]). The filing of a petition or a request for a conference within the 90-day statutory time period is a prerequisite to the jurisdiction of the Division of Tax Appeals (***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996).

C. Where the timeliness of a request for conciliation conference or a petition is at issue, the Division must prove proper mailing of the subject notice (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). The Division may prove such mailing by offering evidence as to its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing of the particular document in question (*id.*).

D. The Division submitted the affidavits of Ms. Mahon and Mr. Baisley and a copy of the April 30, 2001 CMR to prove the fact and date of mailing. I find the evidence to be defective in many respects.

There is a gap in the general procedures for producing and mailing statutory notices set forth in Ms. Mahon's affidavit. While Ms. Mahon explains that the computer assigns a separate certified control number to each statutory notice, she fails to identify on what document, in

addition to the certified mail record, each certified control number is printed. In addition, contrary to Ms. Mahon's assertion in her affidavit, the Notice of Determination appended to her affidavit as Exhibit "B" does not bear a certified control number assigned by the computer. Rather, a separate document, a Form DTF-997, bears the certified control number. Neither Ms. Mahon nor Mr. Baisley have explained the significance of this document. It is impossible to determine whether or not any piece of certified mail contained the Notice of Determination at issue.

In her sworn affidavit, Geraldine Mahon states that the certified control numbers run consecutively on the April 30, 2001 certified mail record listing the statutory notice issued to petitioner appended to her affidavit as Exhibit "A." However, the certified control numbers do not run consecutively on the document appended as Exhibit "A." Since the Mahon affidavit is inconsistent with the certified mail record submitted as Exhibit "A," her certification of authenticity is without value. The Division has not proved mailing of a Notice of Determination to petitioner on April 30, 2001.

E. While petitioner admitted receiving the Notice of Determination, the specific date of receipt has not been established. Therefore the Notice of Determination was received by petitioner on August 25, 2001 at the latest, since this is the date handwritten on the conciliation conference request pertaining to the Notice of Determination. The request for a conciliation conference was filed with BCMS on September 5, 2001. Therefore, such request was timely as filed within 90 days after the date of actual receipt of the Notice of Determination (*see, Matter of Greene Valley Liquors*, Tax Appeals Tribunal, November 25, 1992).

F. The petition of 34 Park Row Luncheonette, Inc. is granted with respect to the issue of timeliness and a small claims hearing will be scheduled on the merits of petitioner's case.

DATED: Troy, New York
January 23, 2003

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE